No. 82-914

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1982

MONSANTO COMPANY, *Petitioner,*

vs.

SPRAY-RITE SERVICE CORPORATION, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Brief of the Small Business Legal Defense Committee As Amicus Curiae In Support of Respondent

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INTEREST OF AMICUS CURIAE

The Small Business Legal Defense Committee ("SBLDC") is a non-profit legal foundation of small business members from throughout the United States which works for governmental policies that facilitate the growth of small business and, in particular, that are consistent with the Small Business Economic Policy Act of 1980 (5 U.S.C. § 631(a)). That act requires the federal government to "foster the economic interests of small business . . . assuring that adequate capital and other resources at competitive prices are available to small business, reduce the concentration of economic resources and expand competition, and provide an opportunity for entrepreneurship, inventiveness, and the creation and growth of small business." Because the policies of that act and the interests of small business are involved in this case, SBLDC appears as *amicus* in support of respondent.

SUMMARY OF THE ARGUMENT

1. The *per se* rule against resale price maintenance ("rpm") has been in effect for more than seventy years, during which business in this country, large and small, has thrived. There is nothing in the experience of these years of effective enforcement to suggest the need for the radical revision that the petitioner and the government here seek.

2. Congress in 1975 repealed the Miller-Tydings and McGuire Acts which had granted to states power to exempt rpm from the antitrust laws. By this and related actions Congress has shown its support for the *per se* rule. In the course of so doing, Congress has considered and rejected numerous arguments in favor of rpm, including those pressed in this case by petitioner and *amici* supporting petitioner.

3. The "free-rider" or "market failure" argument for rpm, the argument most stressed today, is theoretically inadequate and inconsistent with empirical reality. Far from facilitating competition, rpm can be used to cartelize or to exploit information deficiencies among consumers, thus imposing covert price discrimination. Furthermore, rpm is an inept device for dealing with real free-rider problems which can, on the contrary, be effectively dealt with by territorial or location restraints.

4. When a supplier polices "suggested" prices by obtaining reports from dealers about price cutting, the supplier and the dealers are engaging in concerted action in the literal sense. To hold, as petitioner urges, that such action does not violate the antitrust laws absent proof that the parties acting in concert are all acting from the same motive would reduce the *per se* rule against rpm into an easily evaded technicality.

ARGUMENT

Introduction

Seven decades ago this Court held that agreements between a supplier and its dealers fixing resale prices are *per se* violations of the Sherman Act. (15 U.S.C. §1) *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 375 (1911). The act protects dealer pricing autonomy whether interference is initiated by other dealers (*United States v. General Motors Corp.*, 384 U.S. 127 (1966)) or by the supplier, as in *Dr. Miles*. Less than a decade after *Dr. Miles*, the Court held that, acting unilaterally, a supplier may refuse to sell to dealers that resell below prices suggested by the supplier. *United States v. Colgate & Co.*, 250 U.S. 300 (1919). In the years since, *Dr. Miles* has waxed, *Colgate* waned.

The question here concerns the borderline between *Dr. Miles* and *Colgate:* A supplier suggests resale prices. Some dealers comply. One does not. Complying dealers complain to the supplier. The supplier terminates the autonomous price-setter. Must the supplier's conduct as a matter of law be characterized as "unilateral" within the meaning of *Colgate,* or may the court or the jury on proper instructions find a "contract, combination or conspiracy" to maintain resale prices in violation of *Dr. Miles?*[1] The government, as *amicus,* would escalate the issue: it prays that *Dr. Miles* be overruled.

Given recent Congressional[2] and judicial[3] reaffirmation of the *per se* rule against resale price maintenance ("rpm") the government's attack on *Dr. Miles* is bold if not audacious.[4] Yet, in a sense, the government's position

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[1]Particulars are important. Whether the supplier acted in response to dealer complaints about price cutting or for some different reason (such as poor sales, or non-compliance with other, legal requirements) raises a factual question. Here, two courts below found the evidence sufficient to warrant the finding that competitor complaints of price cutting were the reasons for termination. *Cf. Branti v. Finkel,* 445 U.S. 507, 512 n. 6 (1980). A trial court may, of course, take the matter from the jury where the evidence as a whole is insufficient to warrant such an inference. *Cf. Bruce Drug, Inc. v. Hollister, Inc.,* 688 F.2d 853 (1st Cir. 1982).

[2]Consumer Goods Pricing Act of 1975, Pub. L. 94-145, 89 Stat. 810 (1975), amending 15 U.S.C. §§1,45(a).

[3]*California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.,* 445 U.S. 97, 102-103 (1980); *Continental T.V., Inc. v. GTE Sylvania, Inc.,* 433 U.S. 36, 51 n.18 (1977).

[4]Antitrust has become a Congressional-executive battleground. William F. Baxter, incumbent head of the Antitrust Division, has challenged decisions of this Court during oversight hearings with respect to rpm, horizontal agreements "stabilizing" price, tying, and mergers. See generally, *Joint Hearing Before the Comm. on Small Bus. and the Subcomm. on State, Justice, Commerce, the Judiciary and Related Agencies of the Senate Comm. on Appropriations,* 97th Cong., 2d Sess. (1982). Thus, Mr. Baxter views "large enterprises"

puts emphasis where it ought to be; it signifies, quite correctly, that petitioner's seemingly more modest contention is also a direct attack against the continued enforcement of *Dr. Miles*. As this brief will show, *Dr. Miles* was sound when decided and is sound today. It should neither be overruled nor converted by novel construction into a mere trap for the uninformed.

I

EXPERIENCE WITH THE PER SE RULE AND THE COLGATE DOCTRINE MILITATE AGAINST OVERRULING DR. MILES OR WATERING IT DOWN THROUGH CONSTRUCTION.

Justice Hughes' opinion in *Dr. Miles* stressed the Sherman Act's concern with restraint of trade (220 U.S. at 390-404, 406-409) and the common law's resistance to equitable restraints on chattel. (*Id.* at 404-406). The majority upheld the pricing freedom of the dealer against the claim that the supplier needed to control down-stream prices in order to protect its own good will against "confusion and damage." (*Id.* at 407-408). It also rejected the dissenting contention of Justice Holmes that the value to consumers of resale competition was "exaggerated." (*Id.* at 411-413). Save for the narrow *Colgate* incursion, the *per se* rule has applied for seventy years with unmitigated force.[5]

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as being "characteristically more efficient" than small (*Id.* at 17); recognizes that rpm is *per se* unlawful (*Id.* at 95-96), but views it as "desirable" (*Id.* at 98); thinks the *per se* rule against price stabilization is "idiocy" (*Id.* at 11), and apparently regards some of this Court's earlier merger decisions as "wacko" and "rubbish." Where Congress has expressed itself as clearly as it has in support of the *per se* rule against rpm, the proper forum for Mr. Baxter's campaign for legal change is Congress, not the Court. Compare *Arizona v. Maricopa Medical Society*, 457 U.S. 332, 102 S.Ct. 2466, 2478-2479 (1982).

[5] In *Sylvania* this Court emphasized two factors that warranted overruling the *per se* rule against resale territorial restraints: the

Colgate is in tension with *Dr. Miles*. But this Court has confined *Colgate* and expanded *Dr. Miles*. An aberration when decided,[6] *Colgate* has not fared well. In *United States v. A. Schrader's Son, Inc.*, 252 U.S. 85 (1920), the majority held that *Dr. Miles*, not *Colgate*, governed rpm "implied from a course of dealing or other circumstances." (*Id.* at 99-100). *FTC v. Beech-Nut Packing Co.*, 257 U.S. 441 (1922) held that a scheme for enforcing suggested prices deprived the supplier of a *Colgate* defense. What little those cases left of *Colgate* was further eroded by *United States v. Parke, Davis & Co., supra*: If the supplier uses any coercive tactics, *Dr. Miles*, not *Colgate*, applies. (362 U.S. at 38-39). Indeed, *Albrecht v. Herald Co., supra* held that if a supplier utilizes anyone other than its own employees to gain pricing adherence the *Colgate* defense fails. The factual analogies between those cases and this one need not be labored. Unless this Court turns its back on every one of its *Colgate* precedents—precedents cited

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newness of the rule, and the fact that lower federal courts had found it confusing and tended to confine its application very narrowly. (433 U.S. 47-49) Here, the reverse is true on both counts. Not only is *Dr. Miles* a rule of long standing, it is also one that has been broadly and vigorously enforced both here and in the lower courts. Indeed, it is the *Colgate* case, the "exception" to *Dr. Miles*, that this Court has narrowed (*e.g. United States v. Parke, Davis & Co.*, 361 U.S. 29 (1960); *Albrecht v. Herald Co.*, 390 U.S. 145 (1968)) and that lower courts have found confusing. E.g. *George W. Warner & Co. v. Black & Decker Mfg. Co.*, 277 F.2d 787 (2d Cir. 1960).

[6]One commentator says that apart from the fact that Charles Evans Hughes wrote the opinion in *Dr. Miles* and represented the successful defendant in *Colgate* "there seems to be little in the way of consistency between the two cases." J. Jacobson, *On Terminating Price-Cutting Distributors in Response to Competitor's Complaints*, 49 Brooklyn L. Rev. 673 at 673 (Spring, 1983, forthcoming) (citation from page proof)

with approval as recently as *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., supra* at 102—a "suggested" price program with dealers used as a police compliance falls under the *per se* ban of *Dr. Miles.*

Nor is it surprising that this Court has limited *Colgate* virtually to its own facts. The case has had few if any defenders for it so transparently lacks a logical core.[7]

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[7]With a series of four hypotheticals Areeda demonstrates that *Colgate* cannot be reconciled with *Dr. Miles*: (1) If dealers expressly promise to resell at supplier-designated prices, *Dr. Miles* clearly applies. (2) Surely, then, *Dr. Miles* must also apply if dealers make such express promises, even if supplier agrees never to sue to enforce them. Since the promises are illegal and unenforceable in any event, the added term changes nothing; in both case (1) and case (2) the only possible sanction is that the supplier will cease dealing if a dealer violates his promise. (3) But, then, *Dr. Miles* must also apply if the supplier sells to dealers subject to a condition that the dealers will resell at supplier-designated prices. Again, the only sanction is termination, and antitrust liability is hardly to turn on the difference between a covenant and a condition. (4) The fourth step in the Areeda sequence mimics *Colgate* itself: if the supplier "suggests" resale prices and "announces" that non-complying dealers will be cut off, the supplier accomplishes precisely what is accomplished in each of the three prior hypotheticals; any difference either in the verbiage or to psychology of the parties about the nature of their relationship is so trivial as to be non-existent. Areeda, *Antitrust Analysis* § 52 (3d ed. 1981). To characterize the first three as "contracts, combinations or conspiracies," yet the last, the *Colgate* hypothetical, as "mere unilateral action" is unjustifiable. See also Turner, *Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv. L. Rev. 655, 684-706 (1962) (whether induced by threat of refusal to deal or not, acquiescence in a supplier's policy as to resale should be enough to establish vertical "agreement").

II

CONGRESSIONAL ACTION FORECLOSES REVERSAL OF DR. MILES AND SPEAKS AGAINST A LIMITING CONSTRUCTION.

A. In 1975 Congress Repealed the McGuire and Miller-Tydings Acts in Order to Make Rpm Per Se Unlawful.

The *Dr. Miles per se* rule was routinely applied for a quarter of a century.[8] Then Congress passed the Miller-Tydings Act giving states power, in certain circumstances, to legalize rpm.[9] When this Court in *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951), construed Miller-Tydings narrowly, Congress passed the McGuire Act,[10] to make clear that rpm contracts sanctioned by state law could be enforced against "non-signers".

Congress passed those acts to aid small business.[11] But the Consumer Goods Pricing Act, repealing Miller-Tydings and McGuire amendments, was passed in 1975.[12] By then, Congress saw that both small business and consumers would thrive if dealers were free to decide for themselves whether to emphasize price or service competition.[13] As this Court recently said, Congress, by passing that act, "expressed its approval of a *per se* analysis of vertical price restrictions."[14]

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[8]E.g., *Bauer & Cie v. O'Donnell*, 299 U.S. 1 (1913); *Boston Store of Chicago v. American Graphophone Co.*, 246 U.S. 8 (1918); *Frey & Son, Inc. v. Cudahy Packing Co.*, 256 U.S. 208 (1912).

[9]Ch. 690, 50 Stat. 673, 693-94 (1934), amending 15 U.S.C. § 1.

[10]Pub. L. 82-542, 66 Stat. 631 (1952), amending 15 U.S.C. § 45.

[11]See H.R. Rep. No. 1437, 82d Cong., 2d Sess. 2-4 (1952); S. Rep. No. 2053, 74th Cong., 2d Sess. 2 (1937).

[12]Pub. L. 94-145, 89 Stat. 810 (1975), amending 15 U.S.C. §§ 1, 45(a).

[13]S. Rep. No. 466, 94th Cong., 1st Sess. 3 (1975).

[14]*Continental T.V., Inc. v. GTE Sylvania, Inc., supra* at 51 n.18. See also *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., supra* at 102-103.

The legislative history of the 1975 act is replete with indicators of precisely that Congressional intent. At the hearings, enforcement agency officials stated as clearly as would seem possible that the 1975 act would yield *per se* illegality and explained what *per se* illegality would mean in practice.[15] The committee reports show that the House and Senate Committees understood this testimony and wanted to impose the *per se* rule.[16] Finally, the floor debates reflect the same understanding and the same purpose.[17]

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[15]*See Fair Trade: Hearings on S. 408 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. 13 (1975) (testimony of Lewis Engman, Chairman, FTC) [hereinafter cited as *1975 Senate Hearings*]; *Id.* at 18 (testimony of Thomas Kauper, Ass't Attorney General); *Fair Trade: Hearings on H.R. 2384 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 94th Cong., 1st Sess. 116, 120 (1975) (testimony of Keith Clearwaters, Deputy Ass't Attorney General) [hereinafter cited as *1975 House Hearings*]. Opponents of fair trade repeal made precisely the same points. *E.g.*, *Id.* at 48-49 (testimony of Thomas Rothwell).

[16]The conference report states the "purpose" of the act: "Without the [Miller-Tydings and McGuire] exemptions the agreements they authorize would violate the antitrust laws." S. Rep. No. 466, 94th Cong., 1st Sess. 1, (1975). Repeal "will prohibit manufacturers from enforcing resale prices." *Id.* at 2. The House Report is as vivid: "An agreement between a manufacturer and a retailer that the retailer will not resell the manufactured product below a specified price is . . . per se illegal under section 1 of the Sherman Act . . ." H.R. Rep. No. 341, 94th Cong., 1st Sess. 2 (1975). After summarizing asserted justifications for fair trade and rejecting them, the report states that "the Committee concluded that a continued exemption . . . permitting resale price maintenance could not be justified." *Id.* at 5.

[17]*See* 121 Cong. Rec. 38,049-50 (1975) (Sen. Brooke: without the exemptions that the legislation would repeal, rpm would violate the Sherman Act); 121 Cong. Rec. 23,659 (Rep. Rodino: without the exemptions that the legislation would repeal, resale price maintenance agreements "would be *per se* violations of the antitrust laws"). *See also* 121 Cong. Rec.-House 23,600-661 (Reps. Hutchinson, McClory, Van Deerlin).

B. In Reinstating the Per Se Rule Congress Considered and Rejected the Free-Rider and Other Arguments Now Made in Support of Rpm.

Opponents of the 1975 legislation asserted the need for point-of-sale services in the marketing of goods and that rpm was the supplier's way of assuring that these would be provided.[18] The free-rider danger, so much stressed today, was rejected by Congress though presented with sophistication, vehemence and even poignancy.[19] Among the other rpm justifications urged on Congress were: protection for new entrants;[20] danger of "cut-throat competition";[21] quality lowered to meet a price;[22] danger of predatory pricing;[23] "loss leaders" destroying brand reputation;[24] big, low-overhead merchandisers driving out small dealers;[25] benefit to "store brands";[26] and promotion of greater interbrand competition.[27]

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[18] *E.g.*, *1975 House Hearings*, *supra* at 32 (citing Robert Bork), 159-66; *1975 Senate Hearings*, *supra* at 94-95, 97-99, 108-14, and 126-33.

[19] *Id.* at 110-11; *1975 House Hearings*, *supra* at 105, 179-81 (citing Phillip Areeda).

[20] *1975 House Hearings*, *supra* at 51, 55, 61-64; *1975 Senate Hearings* 76-77, 86-92.

[21] *1975 House Hearings*, *supra* at 29.

[22] *1975 House Hearings*, *supra* at 33, 36; *1975 Senate Hearings*, *supra* at 71, 78, 109.

[23] *1975 House Hearings*, *supra* at 40-41; *1975 Senate Hearings*, *supra* at 113-16.

[24] *1975 Senate Hearings*, *supra* at 85, 136.

[25] *1975 Senate Hearings*, *supra* at 76, 78, 84, 111, 118, 128.

[26] *1975 House Hearings*, *supra* at 32, 49, 73, 76; *1975 Senate Hearings*, *supra* at 82, 115.

[27] *1975 House Hearings*, *supra* at 24-25, 73-75; *1975 Senate Hearings supra* at 83, 118.

The House Report summarizes the Committee response. It finds no empirical support for the claim that rpm benefits small sellers. It notes that if such sellers charge more they also provide more convenience and service, thus giving buyers a choice. The Committee also rejected the appeal that manufacturers be free to use rpm to assure that retailers promote and/or enhance the image of the product; the Committee favored assuring customers the opportunity to choose between intangibles like extra service and lower price.[28]

C. Other Congressional Actions Show Support for the Per Se Rule.

In 1963 proponents of rpm sought federal "Quality and Price Stabilization" legislation that would protect rpm from the Sherman Act whether or not states authorized it. They argued that "price-cutting" endangers small retailers, makes market entry more difficult for new brands, threatens the reputation of established brands and may ultimately undermine product quality. Congress declined to act.[29]

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[28]H.R. Rep. No. 341, 94th Cong., 1st Sess. 4-5. Retailer organizations used to support rpm. Not so today. Indeed, the range of *amici* (from a major full service department store chain, to mail order houses) supporting Spray-Rite demonstrates this change of view.

[29]H.R. Rep. No. 566, 88th Cong., 1st Sess. 6-8 (1963), summarizes arguments to support the "Quality Stabilization" bill—the last serious effort to establish a federal fair trade law. They were unpersuasive; after exhaustive hearings (*Quality Stabilization, 1963, Hearings Before a Subcomm. of the House Interstate and Foreign Commerce Comm. on H.R. 3669 and Identical Bills*, 88th Cong., 1st Sess. (1963); *Quality Stabilization: Hearings Before a Subcomm. of the Senate Comm. on Commerce on S. 774*, 88th Cong., 1st Sess. (1963); *Quality and Price Stabilization, Hearings Before a Subcomm. of the House Interstate and Foreign Commerce Comm. on H.J. Res. 636*, 87th Cong., 2d Sess. (1962); *Quality Stabilization: Hearings on S.J. Res. 159 Before a Subcomm. of the Senate Comm.*

Congressional support for the *per se* rule was most recently expressed in connection with the Soft Drink Interbrand Competition Act.[30] The purpose of the act was to make sure that the *Sylvania* rule applied to vertical territorial restraints in the soft drink industry.[31] Witnesses pointed out, however, a risk that the bill might permit vertical price fixing.[32] The Committee added a new section[33] to make clear that such "traditional *per se* violations" would not be legalized.[34]

III

THE FREE-RIDER ARGUMENT FOR REVERSING DR. MILES OR LIMITING IT BY CONSTRUCTION IS UNCONVINCING.

Of the many contentions for rpm the favorite today is the "Chicago school" free-rider theory.[35] Its presupposi-

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on Commerce, 87th Cong., 2d Sess. (1962)) the Senate Committee voted not to report the bill out, while the House Committee kept it from reaching the floor of the House. *See* 111 Cong. Rec. 11,187 (1965) (statement of Rep. Gilligan). *H.R. Rep. No. 566*, 88th Cong., 1st Sess. 6-8 (1963).

[30]15 U.S.C. §§ 3501-3503 (1982).

[31]S. Rep. No. 645, 96th Cong., 2d Sess. 1-11 (1980); H.R. Rep. No. 1118, 96th Cong., 2d Sess. 1-7 (1980).

[32]*Hearings on H.R. 3567 and H.R. 3673 Before the Subcomm. on Monopolies and Commercial Law of the House Judiciary Comm.*, 96th Cong., 1st & 2d Sess. at 183-84, 191, 354-55, 375 (1979-80).

[33]15 U.S.C. § 3502 (1982).

[34]H.R. Rep. No. 1118, *supra* at 4, 6. See also 126 Cong. Rec. H. 5535-5536, H. 5541 (daily ed. June 24, 1980) (Rodino, Sieberling, Hall and Butler). See also Jacobson, *On Terminating Price-Cutting Distributors in Response to Competitors' Complaints*, *supra* at n.39, where this legislative history is discussed more fully.

[35]The theory appears in a series of articles by Professor (now Judge) Bork: *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division (II)*, 75 Yale L.J. 373, 430-38 (1966); *A Reply to Professors Gould and Yamey*, 76 Yale L.J. 731 (1967); and *Resale Price Maintenance and Consumer Welfare*, 77 Yale L.J. 950 (1968). It is summarized in *The Antitrust Paradox* 32-33,

tions are severe and limiting; there must be: a competitive structure at both the supplier and dealer levels; no concerted action among suppliers or among dealers; and rational, profit-maximizing, fully-informed suppliers, dealers and consumers. From those hypothetical assumptions these conclusions are deduced: (1) Rpm will not limit competition among suppliers because a unilateral decision by one of a large number of competitors cannot affect competition. (2) Rpm will not restrict output or increase prices at the dealer level because using it to do that would be adverse to the interest of the rational, profit-maximizing supplier. (3) If a supplier decides to differentiate its product through dealer point-of-sale activities, dealers may refuse to comply unless rpm is used because of the danger of free-riders. (4) Because such a unilateral decision by a supplier will be subject to the competitive market, suppliers that differentiate this way are maximizing consumer welfare. This analysis has been rejected by Congress. For several reasons it should be rejected here as well.

A. The Free-Rider Argument Is Theoretically Unacceptable and Patently Inadequate as a Basis for Ignoring Settled Law and Clearly Expressed Congressional Intent.

In passing the Sherman Act, Congress had in mind several goals associated with a free market.[36] But even

288-98 (1978). The related theory of Professor (now Judge) Posner appears in *The Rule of Reason and the Economic Approach: Reflections on the* Sylvania *Decision*, 45 U. Chi. L. Rev. 1 (1977); *The Next Step in the Antitrust Treatment of Restricted Distribution: Per se Legality*, 48 U. Chi. L. Rev. 6 (1981).

[36] *Northern Pacific Railway Co. v. United States*, 361 U.S.1, 4-5 (1958); Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: the Efficiency Interpretation Challenged*, 34 Hast. L. J. 65 (1982).

limiting consideration to micro-theory and taking efficiency as the only goal, free-rider theory falls short. Well known micro-theorists, including distinguished Chicagoans, find it unacceptable. For example, Professor Ward S. Bowman, Jr. (with credentials as a rigorous micro-theorist of Chicago persuasion) takes quite a different view.[37] Using Chicago's rationality, perfect information and profit maximizing assumptions to argue against legalizing rpm, Bowman shows that resale prices: cannot be maintained unless the product enjoys some degree of monopoly power;[38] probably cannot be maintained without horizontal cooperation;[39] and will be a rational and effective device for a supplier only "where there is a substantial departure from competitive standards both on the producing or manufacturing level *and* on the reselling level. . . ."[40] In sum, rpm signifies the existence and exploitation of bilateral market power, shared by the supplier and dealers.

Thus, Chicago theory gives two alternative explanations for rpm: the Bork-Posner "market failure" explanation, and the Bowman "market power" explanation.[41] Though the Bork-Posner thesis has been better publicized to the judiciary, rigorous theoretical commentary strongly reinforces the Bowman view.[42] The centerist position is perhaps that

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[37]Bowman, *Resale Price Maintenance—A Monopoly Problem*, 25 J. of Bus. 141 (1952).

[38]*Id.* at 145.

[39]*Id.* 145 n.15.

[40]*Id.* at 148.

[41]Caves, *Vertical Restraints as Integration by Contract: Evidence and Policy Implications* (Harv. Inst. of Econ. Research, Discussion Paper No. 754, FTC, April 1980).

[42]Holahan, *A Theoretical Analysis of Resale Price Maintenance*, 21 J. of Econ. Theory 441 (1979).

discussed by Professor Caves.[43] Neither the shared power nor market failure explanation should be reified. Each suggests a possibility, a tendency, perhaps a partial truth. Even though supplier-dealer shared market power is involved in supplier-initiated rpm, the supplier may sometimes be acting to further differentiate its product. However, differentiation is not an unmixed good. It is a way to disaggregate markets—to make the demand curve steeper, to allow the supplier to price above the competitive level.[44] The Caves paper also emphasizes the vast array of devices other than rpm that are available to a supplier seeking to differentiate,[45] and shows that in many actual markets rpm, if used instead of less restrictive means, can severely injure competition.[46]

In their debate with Bork, Professors Gould and Yamey point out yet another crucial defect in free-rider theory.[47] They do not set themselves against Bork's analytical style but insist on pressing its deductive logic as far as it will go. Doing this, they show that when rpm is used by a supplier to differentiate its product and to alter and change consumer taste, there is no theoretical yardstick with which

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[43]Caves, *supra* n.41.

[44]Comanor, *Vertical Territorial and Customer Restrictions:* White Motor *and Its Aftermath*, 81 Harv. L. Rec. 1419 (1968).

[45]Caves, *supra* n.41.

[46]*Id.*

[47]Gould and Yamey, *Professor Bork on Vertical Price Fixing*, 76 Yale L. J. 722 (1967); Gould and Yamey, *Professor Bork on Vertical Price Fixing: A Rejoinder*, 77 Yale L. J. 936 (1968). The Bork articles, with which these papers take issue, are those cited in note 35. Professor Yamey also discusses rpm in Yamey, "Introduction: The Main Economic Issues" in Yamey (ed.), *Resale Price Maintenance* 3-21 (1966).

mirco-theorists can measure effects on consumer welfare.[48] When one turns to industrial organization economists (who trade off some of the "rigor" of Chicago theory for a closer touch with empirical reality), support for rpm virtually disappears.[49] As Low saw the matter in 1970, the economics profession is "overwhelmingly opposed to rpm. . . ."[50]

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[48]Micro-theory is static theory. Its ultimate guide to welfare is what consumers at a given time prefer. When suppliers make efforts—even wholly legitimate ones—to change consumers' tastes, there is no rational way to determine whether the end state is preferable to the beginning state; the yardstick has been altered along with the goods being measured. The Bork-Posner position thus depends on what is ultimately a wholly arbitrary identification between supplier profit-maximizing conduct and consumer welfare. It relies on "the proposition that promotional activities which are profitable to the entrepreneur necessarily improve the allocation of resources," a proposition that "has not, and indeed probably cannot, be derived from standard welfare economics." Since "Bork relies [as does Posner] on standard welfare economics" he "has not demonstrated the validity of his proposition." *Id.* at 77 Yale L. J. 938-39. This difficulty is amplified, of course, when suppliers attempt to change consumer preferences by convincing consumers that a branded product is significantly different from other products when in actuality it is substantially identical with them, or attempt in other ways to mislead consumers about product attributes.

[49]Major industrial organization and antitrust scholars have supported the *per se* ban on rpm. See, e.g., 3 Areeda & Turner, *Antitrust Law* § 828d (1978) (rpm "appropriately forbidden by Sherman Act § 1"); Kaysen & Turner, *Antitrust Policy: An Economic and Legal Analysis* 212-13 (1959); Asch, *Economic Theory and the Antitrust Dilemma* 382-84 (1970); Scherer, *Industrial Market Structure and Economic Performance* 469-93 (2d ed. 1980); Low, *Modern Economic Organization* 424 (1970). Corey, *Fair Trade Pricing: A Reappraisal* 30 No. 5 Harv. Bus. Rev. 47 (1952).

[50]Low, *Modern Economic Organization*, supra at 424. The evidence supports Low's conclusion. In 1963-64 six well known economists circulated the American Economic Association for signatures in opposition to H.R. 3669, the "Quality Stabilization Bill" that would have established a federal fair trade program. Of 1,200

B. The Realities of the Market Place Impeach the Free-Rider Theory.

Free-rider theory uses a supplier decision about supplier welfare as a surrogate for consumer welfare. To do that, the theory must not only assume rational, competitive markets and fully informed buyers and sellers at every level, it must also ignore the essential nature of the retail function and the observable characteristics of real retail markets. The theoretical claim is that informed, rational suppliers know better than do retailers the market-clearing profit-maximizing retail price that will yield the ideal mix of price, promotion and service at the retail level. But that implies that every retailer is just like every other—or ought to be; that there is one, "right" resale price for all.

The implied conception is that all value is added at the manufacturing level—that retailers do nothing but deliver the product (or if they do anything else, they all do the same thing in the same way). On those assumptions all "efficient" retailers will experience the same costs. It is the sum of these costs that must be covered by the manufacturer-imposed price. But the reality of retailing is vastly more varied and complex. Retailers, like others in the chain, add value, and do so in a variety of ways: through inventory, through location, through amenity and through providing information. Moreover, retailers vary greatly

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economists solicited, 572 replied. 570 (including two former chairmen of the Counsel of Economic Advisers, 80 Deans, 102 department heads and at least 255 full professors) indicated opposition to the bill; one indicated support for it; one indicated no opinion. The bill would have done in substance what the government here urges the Court to do by overruling *Dr. Miles*. See Villard, *Opposition to the Quality Stabilization Bill*, 55 Am. Econ. Rev. 683 (1965). See also the testimony of Lawrence Shepard, *1975 House Hearings*, *supra* at 147 (economists "almost universally" regard rpm as an "impediment to competition").

both in style and location. There are significant differences in the amounts of value different retailers add, and, in consequence, large differences in the costs they experience.

Indeed, marked differences in convenience, and hence in costs, can exist even between two retailers performing identical functions but at different locations—say, two full service department stores, one in downtown Washington and one in Seven Corners, Virginia or two boutiques, one in Georgetown, one in Seven Corners. These outlets will be offering very different locational utilities; if markets tell us anything, they tell us that a square foot of space in a prime location is worth more than a square foot elsewhere. Thus, two outlets offering essentially the same range of inventory, amenity and service in contrasting locations are, in the economic sense, offering different services. They experience different costs—often vastly different costs—which reflect the market's assessment of the differences in the value of the different services they provide. There is no credible reason to allow a supplier to interfere with such free-functioning retail markets by dictating a single resale price at which both must sell. It will be unfair to some, overly generous to others, and will inevitably reduce the variety and interests that characterize free, competitive markets.[51]

Differences in cost are magnified when retailers differ not only in location, but also in size, service, inventory and amenity.[52] Retailers may vary in the locational (and thus time) convenience they offer, in the range of merchandise

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[51]Scherer, *Industrial Market Structure and Economic Performance, supra* at 592.

[52]See,e.g. Davidson, Doody and Sweeney, *Retailing Management* Ch. 5 (4th ed. 1975).

available, in the kinds of information and person interaction they provide, and in atmosphere and style.[53] Retailing, then, is a service industry. Retailers do not merely "deliver" the products of their suppliers. Because they add value in these ways they use suppliers' products as an "input," much as an appliance manufacturer uses machine parts as an input. Different retailers combine a particular supplier's product with other elements to provide differentiated outputs, just as different appliance manufacturers differentiate their end product though some inputs are the same.

Contrasts between the neighborhood store and the full service department store, or between the back-street discounter and the full-service department store are familiar. On the face of the matter the per unit costs of one may be several times that of the other. These are but examples. Any urban scene shows a vast continuum in mixes of inventory size, convenience of location, style and amenity, and availability of informed help, service, credit and the like. That costs are as varied is inevitable.

To allow the supplier to mandate one price for all is unrealistic policy. Suppose the centralized decision calls for a price high enough to cover the costs of high-cost retailers. If so, it denies to all lower cost retailers (and to consumers they attract) the benefit of the lower cost marketing strategy these retailers have elected. Indeed, in the first instance, rpm literally foists supra-competitive profits upon low cost retailers. Without rpm each retailer can offer a mix of goods, services and conveniences that differs from those offered by others. One is close at hand, another well stocked and informed, the third cheap. Each is obliged

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[53] *Id.* at 102-108.

by competition (with other like units and across these categories) to set prices commensurate with its own rent, inventory, personnel and other costs. Each attracts consumers that are content with its particular mix. Not only are products differentiated, but retailers are differentiated, and consumer choice expanded. There is no greater reason to allow the supplier of a product, an input to a retailer, to dictate the price of the retailer's product-location-service-amenity output, than there is to allow the supplier of a machine-part input to a manufacturer to dictate the price of the manufacturer's appliance output.[54]

Just as retailers differ—and experiment, develop and change over time—so, consumer demand changes with time. One of the most sensitive aspects of retailing is responding to, and seeking to anticipate, such changes through price and inventory adjustments.[55] Once again, it would be unrealistic to assume that these changes occur everywhere at the same time and rate, so that a centralized response, dictated by the supplier for all retailers, is appropriate. Quite the reverse is true. Centralized decision making by

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[54]Retailers are almost always multi-product outlets. Rent, salaries and overhead costs are common to all products they sell. Thus, retailers cannot price at marginal cost. If the goal is the most efficient price (as it is for Chicago theorists) retailers must spread common costs over all products sold inversely to the elasticity of demand for the products. Baumol and Bradford, *Optimal Departures from Marginal Cost Pricing*, 60 Am. Econ. Rev. 265 (1970). This being so, the efficient price of any product for any retailer will vary with the particular mix of products that the retailer sells. This is another real world variation that a centralized, supplier-mandated, pricing system cannot take into account.

[55]See Irvine, *An Optimal Middleman Firm Price Adjustment Policy: The "Short-Run Inventory-Based Policy,"* 19 Econ. Inquiry 245 (1981); Irvine, *Econometric Tests of the Hypothesis that Market-Maker Firms Follow a "Short-Run Inventory-Based Pricing Policy,"* 53 J. of Bus. 1 (1980).

the supplier is inevitably a blunter, less sensitive response mechanism than is the classical retail system where countless individual traders read and respond to the aspect of the ever changing market with which they individually interact. The classical system, moreover, will provide the supplier, too, with better data about what is happening over the market as a whole than could verbal reports from dealers to suppliers which some of the *amici* tout as appropriate.

The Bork-Posner assertion that supplier welfare is a surrogate for consumer welfare also ignores the dynamic functions of markets. Rpm prevents dealers from "pursuing a low-margin strategy."[56] To the extent that goal is achieved, it "frustrate[s] the adaptation of distribution channels to meaningful changes in consumer wants and . . . encourage[s] the perpetuation of obsolete, inefficient channels."[57] A distribution system with numerous dealers seeking to determine what consumers want, and experimenting with different mixes of point-of-sale service and price, will be a far more sensitive to consumer taste and more capable of dynamic response than would be a distribution system where all such decisions are made monolithically by the supplier.

In a recent study Robert L. Steiner demonstrates such dynamism historically. All of the mass merchandizing innovations—the department store, mail order house, chain store and discount store—entered the market with a different, rather than an inferior, package of goods, amenities, price and service.[58] Each of these innovations lowered

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[56]Scherer, *Industrial Market Structure and Economic Performance*, *supra* at 592.

[57]*Id.*

[58]R. L. Steiner, *Vertical Restraints and Economic Efficiency* 13-25 (Bureau of Economics, FTC, Working Paper No. 66, June, 1982).

price, reduced per unit costs, and gave consumers a wider range of choice. But every one of them could have been foreclosed if rpm had been successfully enforced against them. When this is recognized the claim of free-rider theorists that rpm does not restrain the competitive deployment of down-stream resources collapses. Retailing is a major segment of the economy.[59] It makes its own major contribution to the GNP. Variety, experimentation, and dynamic innovation are as important here as in any other segment of the economy.

When the supplier makes the price-service mix decision for all dealers, an over-investment in service is almost inevitable. All dealers will not be of the same size, nor experience the same population density, nor be equally efficient. Thus, the price the supplier sets will have to be high enough to cover the costs of the highest cost dealer that the supplier wants to keep in the market. Others, initially earning a supra-competitive return, may want to bid against each other for more customers. But not being able to bid by lowering price, they will tend to bid by increasing outlays for advertising and service. They will, in short, act just like airlines acted before deregulation.[60]

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[59]In 1981 retail trade equaled 8% of national income, a total of $197.5 billion, *Statistical Abstract of the United States*, 1982-83 at pp. 424, 800. Retailers employed almost 14 million people, about 15% of total employment (*id.* at 801), and incurred payroll of $90.534 billion (*id.* at 808).

[60]Free-rider theorists view retailers with higher costs than could be covered at the imposed price as "inefficient." But the high cost retailers may have been experiencing high costs because they were offering a product-price-service mix that some consumers highly valued and would, if given the option, have been glad to pay for. And the low cost outlet, being encouraged to spend on promotion rather than exploiting its low cost by price reductions, is being forced into the same inflationary, amenities-increasing spiral that

That is the remarkable irony in the Bork rpm analysis. Chicagoans, like other economists, vehemently oppose government price-control where competitive price determination is feasible.[61] As an analytical school they often respond to claims about "market failure" by finding the source of the problem in a bad rule of law or by saying, "Do not worry; the market will cure it in time."[62] But for rpm Bork reverses field. To deal with the relatively trivial free-rider market failure, he opts for centralized price-setting by suppliers—an interference with competitive pricing that can distort the free market much as price-setting by government.

The actual results that would flow from legalizing rpm are reasonably clear. Though the empirical evidence is episodic and impressionistic,[63] it indicates that rpm not only reduces dealer autonomy and consumer choice, but also leads to higher consumer prices. Contrary to the Bork-Posner thesis prices are likely to be substantially higher and output substantially lower under fair trade than in a free market.[64] Steiner reviewed theoretical and empirical material, and also turned to the marketing literature, a source close to the marketplace. He flatly rejects the notion that unless rpm is a dealer cartel it is welfare increasing.

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affected the airline industry before deregulation. See 2 A. Kahn, *The Economics of Regulation* 208-220 (1966); *CAB Practices and Procedures*, Report, Subcomm. on Adm. Prac. and Proc., S. Comm. on the Judiciary, 94th Cong., 1st Sess. 6 (1975).

[61]See, e.g., Stigler, *The Theory of Economic Regulation*, 2 Bell J. 3 (1971); Posner, *Theories of Economic Regulation*, 5 Bell J. 335 (1974).

[62]*Id.* See also Posner, *Economic Analysis of Law* 271 (2d ed. 1977).

[63]Frankel, *The Effects of Fair Trade: Fact and Fiction in the Statistical Findings*, 29 J. of Bus. 182 (1955).

[64]H.R. Rep. No. 341, 94th Cong., 1st Sess. 3 (1975); 121 Cong. Rec. Senate-20872 (daily ed. December 2, 1975); 1975 Senate Hearings 3-4, 11, 26-27, 51-52, 150-151, 174, 176, 216 and authorities

"Inclusion of realities . . . results in a considerably less benign assessment. . . ."[65] He concludes that rpm occurs mostly in industries, dominated by distributive trades, where consumers are poorly informed; in such industries restraints on intrabrand competition evolve whether or not any free-rider problem exists.[66] Consumer welfare is injured and supplier welfare may be also, since suppliers tend to continue such restraints long after they serve their interests.[67]

Another premise of free-rider theory is that low service outlets drive out high service outlets. But the marketplace

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there cited at 174 n.5. Relatedly, per store sales are lower where fair trade is in effect than when it is not. See ABA Antitrust Section, *Monograph No. 2, Vertical Restrictions Limiting Intrabrand Competition* 80 (1977). There are confirming studies of particular segments. E.g., W. A. Sandridge, *The Effects of Fair Trade on Retail Prices of Electrical Housewares in Washington, Baltimore and Richmond*, 1952-9 (Ph.D. Dissertation, Univ. of Va., 1960), cited in S.C. Hollander, "United States of America," in Yamey (ed.) *Resale Price Maintenance, supra* at 85 n.48 (1966); Bowman, *The Prerequisites and Effects of Resale Price Maintenance, supra* at 852-73 (one-half of tooth paste sales in non-fair trade states and one-third in fair trade states below suggested price); Hourihan and Markham, *The Effects of Fair Trade Repeal: The Case of Rhode Island* (1974); Pickering, *The Abolition of Resale Price Maintenance in Great Britain*, 26 Oxford Econ. Papers 120 (1975); Keoch, *The Abolition of Resale Price Maintenance: Some Notes on Canadian Experience*, 31 Economica 260 (1964). Most recently, after state liquor rpm laws were repealed following this Court's *Midcal* decision, retail prices fell about 20%. See New York Times, Sun., Jan .14, 1979, § XI, p. 1, c. 1; New York Times, Jan. 3, 1979, p. 1, c. 1.

[65]Steiner, *Vertical Restraints and Economic Efficiency, supra* at 2. See also Buchanan, "Resale Price Maintenance: An Historic Perspective" in *Sixteenth New England Antitrust Conference* at 356-416 (1982).

[66]*Id.* at 8-11.

[67]*Id.* at 12-13. This conclusion is confirmed by case studies. Sharon Oster, *The FTC v. Levi Strauss: An Analysis of the Economic Issues* (Consultant's Report to FTC, Rev. March 1982); McEachern and Romeo, *Audio Components Industry: An Economic Analysis of FTC Intervention* (Consultant's Report to FTC, 1981).

refutes this. Small, local stores with relatively high per-unit overhead do not go out of business because larger, more centrally located stores with lower per-unit costs sell for lower prices; the small, local stores provide convenience, service and amenity that the larger, centrally deployed units cannot match. Some consumers (having the choice) pay more to get what they value more. Even in central cities high amenity, high-rent, full service department stores with displays, informed sales help, and service facilities consistently thrive within blocks of discount houses offering less amenity, less information, less service and lower prices. Some consumers prefer the amenity and reliability of a Macy's. Others will pay even more for an "exclusive" or "boutique" atmosphere. But others will shop price if rpm does not foreclose. Rpm supporters overestimate the free-rider problem because they underestimate the variety and complexity of consumer interests, the innovativeness and responsiveness of retail entrepreneurs, and the resilience of free, competitive markets. The antitrust laws do not. They protect dealer autonomy and consumer choice."[48]

C. While Doubt Exists Whether Rpm is Used to Avoid Free-Riders, There Is Virtually Universal Agreement That Rpm Can Be and Is Used to Cartelize.

Theorists, including Bork and Posner, regard rpm as a useful device for cartelization.[49] Indeed, the classic support for rpm has been from organizations concerned

[48]Kaysen & Turner, *Antitrust Policy, supra* at 11-22; Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 Cornell L. Rev. 1140 (1981); Pitofsky, *The Political Content of Antitrust*, 127 U. Pa. L. Rev. 1051 (1979).

[49]The Bork and Posner views appear in the works cited in note 35 *supra*. For the views of other theorists see, e.g., the works cited in notes 41, 47 and 49.

about maintaining margins.[70] Where consumer information problems are significant a supplier may have little resistance to dealers urging the use of rpm. Nor need dealer cartelization be explicit. In some markets, retailers as a class have market power because most consumers lack relevant information, think retailers have it, and are ready to accept retailer guidance. To induce such retailers to favor its brand, a manufacturer may establish rpm. The social consequence is so close, as a practical matter, to dealer cartelization that to forbid the one and allow the other would be indefensible.

Moreover, rpm can facilitate supplier cartelization, interdependent pricing or price signaling. Concerted pricing is a risk in an oligopolistic industry. *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978). But just as producers have an incentive to cooperate each, individually, has an incentive to "cheat" by pricing competitively. Rpm, if used by several producers, makes cheating easier to detect, thus reinforcing industry-oriented (cooperative) rather than firm-oriented (competitive) pricing.[71]

D. Rpm Can Be and Is Used to Exploit Information Deficiencies to Facilitate Price Discrimination.

Free-rider theory concedes that there are gaps in consumer information, but assumes that suppliers will provide accurate information in response. Not always. A supplier may act strategically. It may take advantage of consumer

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[70] Fulda, *Resale Price Maintenance*, 21 U. Chi. L. Rev. 175 (1954); *Report on Quality Stabilization Bill*, H.R. No. 566, 88th Cong., 1st Sess. (1963).

[71] 3 Areeda & Turner, *Antitrust Law* § 828d (1978) (one objection to rpm is that oligopolistic manufacturers may use it to facilitate parallel pricing).

information gaps and use rpm to price discriminate (knowledgeable consumers getting the lower price, uninformed ones paying the higher). Such a supplier markets its product under two brand names. Rpm is used for the "prestige" brand, which is advertised widely. This signals dealers that high mark ups will be maintained and encourages them to "guide" consumers seeking product information to this product. The unadvertised brand—identical, or nearly so—is available for the knowledgeable consumer who can judge the price-quality relationships for himself (as well as for the consumer that shops for the lowest price, regardless of possible quality differences). In sum, if suppliers and dealers are always rational profit maximizers (as Chicago theory assumes they are) making rpm available to them is likely to injure consumers whenever information deficiencies make strategic exploitation feasible.[72]

E. Any Legitimate Goal Sought by a Supplier Can Be Achieved by Less Restrictive Means Than Rpm.

Usually, a supplier can obtain the point-of-sale activity it wants by judicious choice of the retailers to which it sells.[73] When a supplier—for example, a new entrant seeking to attract dealers or a supplier hoping to mandate highly specific and expensive point-of-sale activities and worried about free-riders—wants to influence downstream

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[72]See generally R. L. Steiner, *Vertical Restraints and Economic Efficiency, supra.*

[73]Differing styles of retailing are reflected in differing investments at the retail level. Styles, moreover, are "built into": the real estate (both location and facilities); the inventory capacity and control system; the management background, training and experience; the personnel patterns; and the store's reputation and good will. When a supplier decides to sell to a particular dealer the supplier has ample information about how the product will be handled and can be confident that the particular style and point-of-sale promotion used by the retailer will not radically or rapidly change.

activities more directly, there are more effective, less restrictive, means than rpm. These include the customer, territory and location restraints authorized by *Sylvania*, primary responsibility or pass-through clauses, direct payments to dealers for services, cooperative advertising, warranty compensation arrangements, and other arrangements as varied and fine-cutting as the genius of the marketing manager can devise."[14]

Indeed, rpm is not well suited to deterring the free-rider. If a supplier imposes and enforces resale territory or location restraints the free-rider is effectively foreclosed. Point-of-sale promotion has effects only within a limited geographical area; if that area is reserved to the promoting dealer, he gets the full benefit. But if another dealer is in the same area, to forbid price cutting does not preclude the second dealer from sharing the benefits of promotion by the first. Territorial protection can help to "internalize" promotion. Rpm cannot. But if rpm is in effect, the market's "central nervous system"[15] will not be able to reflect differences in dealer offerings.

IV

TO HOLD THAT COMPLAINTS FROM DEALERS FOLLOWED BY TERMINATION FOR PRICE CUTTING, IS "UNILATERAL CONDUCT" AS A MATTER OF LAW WOULD BE TO REDUCE DR. MILES TO AN EASILY EVADED TECHNICALITY.

Where two or more dealers complain of price cutting by another and the supplier, in response, imposes discipline,

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[14] See generally Caves, *Vertical Restraints as Integration By Contract: Evidence and Policy Implications*, *supra*.

[15] *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940).

there is "concerted action" in a literal sense. Petitioner here cannot challenge the sufficiency of the evidence to show such a literal conspiracy. It rather contends that when a supplier polices resale prices through dealer complaints the concert involved should be called "unilateral" unless the supplier's reasons for wanting to inhibit price competition are the same as those of dealers. But a *Dr. Miles* conspiracy need not entail vertically related parties all acting from the same motive. Indeed, in *Dr. Miles* itself, the supplier had its own independent reasons for wanting rpm—to protect product good will against confusion, essentially the same reason petitioner asserts here.

The argument by petitioner's *amici* that the need for "communication" between supplier and dealers makes it necessary to modify *Dr. Miles* is equally unconvincing. *Amici* assert that dealers are the best source of information about what resale prices ought to be. They infer that suppliers that set prices should, therefore, be able to talk about prices with dealers. This argument proves too much. Dealers *are* the best evaluators of retail prices. But this is why they should be setting prices themselves, not reporting and discussing prices with suppliers. Other like arguments are equally weak. Consider, for example, the claim that if a dealer shades "suggested" prices it can be inferred that it is also likely to be violating other (legal) resale restraints. The inference is presumably based on the assumption that all dealer costs are identical, and that price shading must therefore signify cutting the costs of point-of-sale services the supplier seeks to encourage. But as shown above, retailer costs can vary within a wide range and for a variety of reasons. The fact that all dealers are engaging in mandated point-of-sale activities will reduce cost differ-

ences, perhaps, but will hardly eliminate them. In any event *Sylvania* restrictions, (and other lawful resale restrictions) are not supposed to serve as *sub rosa* means of maintaining resale prices.

Nor is the existing *per se* rule confusing. Suppliers that want to avoid a *Dr. Miles* violation may do so readily enough. If they use a *Colgate* "suggested price" system, they must not police it through a dealer caucus. They must maintain "Doric" simplicity."[16] If they impose *Sylvania* restraints, they must enforce these consistently.

To label "unilateral" conduct that is literally concerted and often coercive in order to facilitate supplier control of down-stream prices would be to reduce *Dr. Miles* to a trap for the inept."[17] Any supplier, competently advised, would be able to establish and maintain an rpm system. There is simply no justification for such diminishment of *Dr. Miles*. Suppliers can attain all legitimate goals without rpm. Rpm denies retailers freedom to price in a manner commensurate with the costs of their particular product-service-amenity mix. Rpm reduces consumer alternatives and may be used to exploit consumers. It ought not to be accomodated either directly, or by convoluted construction.

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[16] *George W. Warner & Co. v. Black & Decker Mfg. Co.*, 277 F. 2d 787, 790 (2d Cir. 1960).

[17] "It is significant that when Congress repealed the Miller-Tydings and McGuire Acts in 1975, it acted with recognition and approval of the fact that "[s]ubsequent cases have limited *Colgate* strictly to its own facts, finding a Sherman Act violation in the slightest hint of concerned activity. . . ." *1975 House Hearings, supra* at 2 n.1.

CONCLUSION

For all of the above reasons, this Court should refuse to legalize rpm either by overruling *Dr. Miles* or by adopting constructions of "unilateral" and "contract, combination or conspiracy" which would, as a practical matter, enable suppliers to evade *Dr. Miles*.

Respectfully submitted,

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